90-589

No. ———

FILED
OCT 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE TORO COMPANY,

Petitioner

v.

WHIPPLE VAN NESS JONES, JR., and
MARYANN CASSEAUX JONES, HIS WIFE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a party waives its right to challenge an inconsistent jury verdict by failing to raise an objection before the jury is discharged.

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MARYANN CASSEAUX JONES, HIS WIFE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Toro Company [1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is unreported. The district court did not issue an opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1990 (App., *infra*, 4a-5a). On August 13, 1990, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including October 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Pursuant to Rule 29.1 of the Rules of this Court, Toro states that it has no parent corporation and no subsidiary corporation other than wholly owned subsidiaries.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rule 49 of the Federal Rules of Civil Procedure provides:

> **(a) Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
>
> **(b) General Verdict Accompanied by Answer to Interrogatories.** The court may submit to the jury, together with appropriate forms for a gen-

eral verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

STATEMENT

This case arises out of a fire that occurred at the home of the respondents, north of Tallahassee, Florida, on February 14, 1987. On that date, after respondent Van Jones had completed mowing a portion of his property with his Toro lawn mower and was refueling the machine, "a fire somehow started around the mower's engine." App., *infra*, 2a. As a result of the fire, Mr. Jones sustained second and third degree burns over 37 percent of his body.

The Joneses filed suit against both Toro and Mulvaney's, Inc., the seller of the lawn mower, in Florida state court. After Mulvaney's was dismissed from the lawsuit without prejudice, Toro removed the case to the United States

District Court for the Northern District of Florida on the basis of diversity jurisdiction.

In their complaint, the Joneses alleged both strict liability and negligence on the part of Toro. Following a week-long trial, the case was submitted to the jury by way of special verdicts pursuant to Fed. R. Civ. P. 49(a). Although the jury found that there was no design defect in the mower, it nevertheless concluded that Toro had been negligent. App., *infra*, 6a. The jury thus responded to the relevant special verdicts as follows:

> 1. Did The Toro Company place the lawnmower on the market with a defect which was a legal cause of damage to Van Jones?
>
> Yes ____ No X
>
> 2. Was there negligence on the part of The Toro Company which was a legal cause of damage to Van Jones?
>
> Yes X No ____

Id. The jury also found Mr. Jones 15 percent comparatively negligent. As a result, the district court entered a verdict against Toro in the total amount of $1,026,800.[2]

Toro filed timely post-trial motions seeking a new trial or, in the alternative, a remittitur. Among other things, Toro argued that the jury's verdict was fatally inconsistent because, unless Toro's product was defective, there was no basis in the record for a finding of negligence on its part. The district court denied Toro's post-trial motions without opinion on August 4, 1989.

The Eleventh Circuit affirmed. The court of appeals rejected Toro's claim of inconsistency of the verdict on the ground that Toro had waived that objection by failing to raise it before the jury was discharged:

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[2] The jury had concluded that Mr. Jones had sustained damages in the amount of $1,058,000 and that Mrs. Jones had been damaged to the extent of $150,000.

> The Eleventh Circuit follows the rule that a failure to challenge the consistency of a 49(a) verdict before the jury is excused constitutes waiver of a later challenge. *See Golub v. J.W. Gant & Assocs.*, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989); *ITEL Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1261 (11th Cir. 1983). Because Toro did not raise its objection in the district court before the jury was excused, Toro's objection to the consistency of the verdict is waived on appeal.

App., *infra*, 2a.

REASONS FOR GRANTING THE PETITION

The decision below squarely conflicts with the rule in the majority of the circuits that a party may challenge inconsistent special verdicts rendered pursuant to Rule 49(a), Fed. R. Civ. P., without having objected to the inconsistency of the verdict before the jury was discharged. Resolution of this question is essential to the uniform and effective application of Rule 49. In addition, imposition of a strict "waiver rule," precluding review of inconsistent verdicts, seriously implicates the constitutional right to a jury trial. Finally, the courts below failed to recognize the clear distinction between Rule 49(a) and 49(b) and, in so doing, undermined the utility of special verdicts in resolving complex disputes.

1. There is a clear conflict among the courts of appeals regarding the question presented by this case. The United States Courts of Appeals for the Third, Fourth, Fifth, Ninth and Tenth Circuits have all correctly held that Rule 49(a) does not require a party to object to inconsistent special verdicts before the jury is discharged on pain of forfeiting its right to reconciliation or, if reconciliation is impossible, to a new trial. *Bonin v. Tour West, Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990); *Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th

Cir. 1987);[3] *Ladnier v. Murray*, 769 F.2d 195, 198 n.3 (4th Cir. 1985); *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 144-45 (3d Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Mercer v. Long Mfg. N.C., Inc.*, 671 F.2d 946, 947-48 (5th Cir. 1982).

On the other hand, the Eleventh Circuit has summarily held in the case at bar, relying on *Golub v. J.W. Gant & Assocs.*, 863 F.2d 1516, 1520 n.4 (11th Cir. 1989), and *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1261 (11th Cir. 1983), that a strict "waiver rule" applies. Although the Eleventh Circuit acknowledges the contradictory precedent on this issue, *see Golub v. J.W. Gant & Assocs.*, 863 F.2d at 1520 n.4, it continues to follow the rule that "all challenges to the consistency of special verdicts must be raised before the jury is excused." *Id.* (citing *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d at 1261). The First Circuit also applied the "waiver rule" in *Skillin v. Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981).[4] Other courts also have acknowledged the split. *See, e.g., Rivera v. La Porte*, 896 F.2d 691, 695 n.1 (2d Cir. 1990).

2. The significance of the question presented by this petition is magnified because application of the "waiver rule" impinges on the constitutional right to a jury trial. As the Fifth Circuit explained in *Mercer v. Long Mfg. N.C., Inc.*, 671 F.2d at 948 n.1 (quoting *Griffin v. Ma-*

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[3] In *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 182-83 n.6 (9th Cir. 1989), *cert. denied*, No. 89-885 (Jan. 22, 1990), the Ninth Circuit noted that an aspect of the *Pierce* decision not relevant to the issue presented here was inconsistent with subsequent Supreme Court precedent and rejected *Pierce* to that extent.

[4] It is unclear from the court's opinion in *Skillin*, however, whether the submission in that case was pursuant to Rule 49(a) or Rule 49(b). *See Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1430 n.6 (10th Cir.) (McKay, J., concurring in part and dissenting in part), *cert. denied*, 479 U.S. 1007 (1986). The significance of the distinction between Rule 49(a) and 49(b) is discussed at pages 10-11, *infra*.

therne, 471 F.2d 911, 915 (5th Cir. 1973) (citations omitted)):

> The legal error resulting from the entry of a judgment based on inconsistent special interrogatories is one which undermines the validity and integrity of the judgment and may, in fact, run afoul of the Seventh Amendment by allowing the District Court to usurp the jury's function. The Seventh Amendment creates a delicate balance.
>
> > [I]f there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly . . . . If on review of the District Court's judgment we find that there is no view of the case which makes the jury's answers consistent and that the inconsistency is such that the special verdict will support neither the judgment entered below nor any other judgment, then the judgment must be reversed and the cause remanded for trial anew.

See also Ladnier v. Murray, 769 F.2d at 198 n.3 (quoting *Mercer v. Long Mfg. N.C., Inc.*, 671 F.2d at 948 n.1).

The right of a party to seek reconciliation of an inconsistent jury verdict or, if reconciliation is not possible, a new trial, is firmly grounded in the Seventh Amendment right to a jury trial. "The right to a jury trial guaranteed by the Seventh Amendment requires us 'to reconcile apparently conflicting answers if at all possible and thus validate the verdict.' If, after careful consideration, the answers cannot be reconciled, a new trial must be ordered." *Bourque v. Diamond M. Drilling Co.*, 623 F.2d 351, 353 (5th Cir. 1980) (citations omitted). *See also Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 119 (1963); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962); *Pierce v. Southern Pac. Transp. Co.*, 823 F.2d at 1370; *cf. Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 635 (2d Cir. 1986) ("[i]n fairness to trial courts *and in order to preserve parties' Seventh Amendment rights*, appellate courts 'struggle' to find a way of reconciling seemingly incon-

sistent interrogatory answers and verdicts") (emphasis added) (discussing Rule 49(b)).

Under Rule 49(a), the trial court is expected to " 'translate' the jury's findings on controlling fact issues into a judgment." *Downs v. Gulf & Western Mfg. Co.*, 677 F. Supp. 661, 668-69 (D. Mass. 1987); *see* 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 49.02 at 49-9 (2d ed. 1990) (emphasis added) ("In the special verdict the jury reports back to the court on issues of fact which are then translated into a judgment by the court's application of the law. The procedure leaves to the trial judge the responsibility of applying appropriate legal principles to *the facts found by the jury*"). If the jury's fact findings are inconsistent, the trial court cannot perform its task unless it usurps the jury's fact-finding function. *Cf. Solimene v. B. Grauel & Co.*, 399 Mass. 790, 800-01, 507 N.E.2d 662, 669 (1987) ("[i]f the answers cannot be harmonized with the evidence and the instructions, and . . . the jurors have been discharged and cannot be reinstructed, a new trial is required because it is the jurors' constitutional responsibility to resolve the facts") (interpreting Mass. R. Civ. P. 49(a) consistently with construction placed on federal counterpart because Massachusetts rules are patterned after the federal rules).[5]

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[5] As noted above, the inconsistency in the jury's verdict arises from its finding, on the one hand, of no defect in the product on which to base strict liability, and, on the other hand, its finding of negligence. A verdict based on this inconsistency cannot stand. *See, e.g., Consolidated Aluminum Corp. v. Braun*, 447 So.2d 391, 392 (Fla. Dist. Ct. App. 1984) ("[h]ow could Consolidated have been negligent in design and manufacture of a product which contains no defect?"). Respondents have contended that this inconsistency may be reconciled, if it is assumed that the jury found Toro negligent for failure to provide adequate warnings. The record, however, contains no evidence that Toro was negligent in providing warnings or that, if different warnings had been provided, they would have prevented the injury to Mr. Jones. *See Downs v. Gulf & Western Mfg. Co.*, 677 F. Supp. at 667 ("[a]lthough these or other scenarios may in fact approximate the jury's thinking, the court is not able to accept defendant's contentions. First of all, they are far

Although, to be sure, in certain circumstances, the constitutional right to a jury's verdict may be waived, at some point efficiency must yield to the right to a consistent verdict. *See generally United States v. Simon*, 839 F.2d 1461, 1472 (11th Cir.) ("[o]f course, we cannot elevate considerations of judicial economy to the point where they interfere with the appellants' constitutional rights"), *cert. denied*, 487 U.S. 1223 (1988). Here, the record of the proceedings discloses no evidence that petitioner deliberately waived its right to object to inconsistency of the jury's verdict. The district court did not itself note the inconsistency of the jury's findings and, accordingly, did not offer to submit the case to the jury for further deliberations. Under ideal circumstances, petitioner would have recognized the inconsistency immediately and requested resubmission before the jury was dismissed. The desirability of such a request, however, does not warrant imposition of the harsh penalty of waiver for its lack. *Mercer v. Long Mfg. N.C., Inc.*, 671 F.2d at 947 ("[w]hile there are many practices which we recommend parties follow, extolling the virtues of a procedure is not equivalent to mandating that it be followed with the dire consequence of waiver for failure to adopt the practice").

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more resourceful, and subtle, than the theories or evidence presented at trial. Scant evidence or argument was directed to the adequacy of warnings, and what little there was failed to make the 'fine distinctions' between theories and degrees of fault suggested now by defendant"). Respondents also have suggested that the jury may have erroneously but reasonably believed that different standards obtain for determining the existence of a product defect under a strict liability theory as opposed to negligence. To the contrary, it cannot reasonably be presumed that such an abstruse distinction, even if it existed in the law, was derived by a jury of laypersons from the verdict form before them or the trial court's instructions. *Cf. Bonin v. Tour West, Inc.*, 896 F.2d at 1263 (reversing attempted reconciliation where the language of questions submitted to the jury was "too similar" to hold that the jury distinguished between negligence that caused the accident and negligence that caused the injuries).

3. The "waiver rule" not only implicates constitutional rights, but also thwarts the proper functioning of Rule 49(a), which has been described as "a handy, workable, reasonably simple, over-ignored tool . . . remarkably effective in fact-resolution and the matching of such resolution against known or changing, or contradictory legal principles." Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968).

The courts below erroneously failed to distinguish between the requirements of Rule 49(a) and 49(b).[6] As discussed below, the procedures set forth in the two subsections are entirely different. *See Downs v. Gulf & Western Mfg. Co.*, 677 F. Supp. at 668 ("[i]t is helpful at the start to distinguish between Rule 49(a) and Rule 49(b) because they govern different sorts of special verdicts and may give rise to different legal results").

> Rule 49(b) offers, so far as I can see, nothing but trouble because it seeks to meld a general verdict and special answers with the high likelihood of conflict which extinguishes both. Rule 49(a), on the other hand, if used with skill and resourcefulness melds the general *charge* (not verdict) with the special answers to specific controlling issues of fact or legal fact.

Brown, 44 F.R.D. at 339-40 (emphasis in original). "As a result, [under Rule 49(a)] there could be no inconsistency with a general verdict such that the court, in Rule 49(b)'s express words, 'shall return the jury for further consideration of its answers [and verdict] . . .'—a command absent entirely from Rule 49(a)." *Downs v. Gulf & Western Mfg. Co., Inc.*, 677 F. Supp. at 669. In-

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[6] The Eleventh Circuit in *Itel*, 707 F.2d at 1261, arrived at its erroneous conclusion with regard to Rule 49(a) by applying the Fifth Circuit's reasoning in *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-35 (5th Cir. 1974), which arose under Rule 49(b). Ironically, the Fifth Circuit, on which the *Itel* court expressly relied, has long since held that there is no waiver of the right to object to inconsistent verdicts under Rule 49(a). *See Mercer v. Long Mfg. N.C., Inc.*, 671 F.2d at 947-49.

deed, it is precisely because of the absence from Rule 49(a) of any comparable provision for resubmission to the jury that the majority of the courts of appeals that have considered the issue have held, as discussed above, that a party may object to inconsistencies in a verdict post-trial. *See Bonin v. Tour West, Inc.*, 896 F.2d at 1262-63; *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 734 F.2d at 145; *Mercer v. Long Mfg.*, 671 F.2d at 948 and n.1. *See also Downs v. Gulf & Western Mfg. Co., Inc.*, 667 F. Supp. at 669-70.[7]

The instant case demonstrates the vice in applying the strict "waiver rule." Since the factual basis for the verdict is unclear, it is impossible to determine whether the verdict is legally supportable. The jury's findings, as well as the district court's application of law, are insulated from meaningful review. These defects subvert the purpose of Rule 49(a)—to enable "the public, the parties and the court to see what the jury really has done," 5A *Moore's Federal Practice* ¶ 49.02 at 49-5 to 49-6 (quoting Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253, 259 (1920))—and undermine the rule's utility in complex litigation. *See Downs v. Gulf & Western Mfg. Co.*, 677 F. Supp. at 669 (citing Brown, *supra*, 44 F.R.D. at 344-45 (Rule 49(a) special verdicts suited for product liability suits)); *see generally* 5A *Moore's Federal Practice* ¶ 49.02 at 49-6 to 49-7 & n.6. Review by this Court is warranted for these reasons as well.

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[7] Conversely, the courts have held that the doctrine of waiver *does* apply under Rule 49(b). *See, e.g., Minpeco, S.A. v. Hunt*, 718 F. Supp. 168, 181 n.17 (S.D.N.Y. 1989).

In addition, Rule 49(a) expressly provides for a waiver of the right to a jury trial on the particular "issue of fact raised by the pleadings or by the evidence" if the party fails to demand its submission to the jury before the jury retires. The fact that the drafters of Rule 49(a) expressly provided therein for one sort of waiver undercuts the notion that a waiver of another type, *not* expressly provided for, nevertheless should be implied.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 1990

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3764

Non-Argument Calendar

D. C. Docket No. TCA 88-40169

WHIPPLE VAN NESS JONES, JR.,
MARYANN CASSEAUX JONES, his wife,
Plaintiffs-Appellees,

versus

THE TORO COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(May 24, 1990)

Before FAY, EDMONDSON and COX, Circuit Judges.

PER CURIAM:

This is a products liability action brought in federal court under diversity jurisdiction. The Toro Company ("Toro"), defendant below, appeals the district court's denial of its motion for a new trial. The jury awarded plaintiffs Van and Maryann Jones damages for injuries

suffered as a result of Van's being burned; Van was refueling his Toro lawn mower when a fire somehow started around the mower's engine. The jury found that Toro was not strictly liable, specifically finding no design defect in the mower. The jury found, however, that Toro was negligent.

Toro argues that this verdict was inconsistent because there was no evidence in the record to support a finding of negligence absent a design defect. Because the case also presents a question about certain warnings that ought to have been given by Toro, we doubt that the verdict was inconsistent; but we need not decide that matter. The jury issued the special verdict in the form of answers to questions presented by the court pursuant to Federal Rule of Civil Procedure 49(a). The Eleventh Circuit follows the rule that failure to challenge the consistency of a 49(a) verdict before the jury is excused constitutes waiver of a later challenge. *See Golub v. J.W. Gant & Assocs.*, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989); *ITEL Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1261 (11th Cir. 1983). Because Toro did not raise its objection in the district court before the jury was excused, Toro's objection to the consistency of the verdict is waived on appeal.

Toro also appeals the denial of its motion for a new trial on the ground that the district court orally gave the jury confusing instructions. The jury instructions taken as a whole appear clear enough, but we need not decide the question in the most technical way. Pursuant to Federal Rule of Civil Procedure 51, an objection to a jury instruction must be made before the jury retires. *See McClow v. Warrior & Gulf Navigation Co.*, 842 F.2d 1250, 1253 (11th Cir. 1988). Toro did not object to the court's oral instructions and, in the absence of such an objection, we will reverse only where we find plain error. *Id.* Toro complains that the district judge told the jury that it should determine "whether the Toro Company was

negligent in designing the manufacturer of the lawn mower in a negligent condition." The written instructions, which Toro concedes were accurate and which were available to the jury during deliberations, said the issue was whether Toro "was negligent in designing or manufacturing the mower in an unsafe condition." ROA 3-99,9. We find no error in the judge's oral misstatement " 'so fundamental as to result in a miscarriage of justice.' " *Id.* (citation omitted).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3764
Non-Argument Calendar

D.C. Docket No. TCA 88-40169

WHIPPLE VAN NESS JONES, JR.,
MARYANN CASSEAUX JONES, his wife,
Plaintiffs-Appellees,

versus

THE TORO COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

Before FAY, EDMONDSON and COX, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 24, 1990

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ David Maland
Deputy Clerk

Issued as Mandate: Jun 20, 1990

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. TCA 88-40169

WHIPPLE VAN NESS JONES, JR.
and MARYANN JONES, his wife,
Plaintiffs,

vs.

THE TORO COMPANY,
Defendant.

VERDICT

WE, THE JURY, RETURN THE FOLLOWING VERDICT:

1. Did The Toro Company place the lawnmower on the market with a defect which was a legal cause of damage to Van Jones?

Yes No X

Answer question 2.

2. Was there negligence on the part of The Toro Company which was a legal cause of damage to Van Jones?

Yes X No

If your answers to both questions 1 and 2 were No, your verdict is for the Defendant The Toro Company and you should proceed no further but to date and sign this verdict form and return it to the courtroom. If your answer to either question 1 or 2 is Yes, please answer question 3.

3. Was there negligence on the part of Van Jones which was a legal cause of his damages?

Yes X No

If your answer to question 3 is Yes, answer question 4. If your answer to question 3 is No, skip question 4 and answer question 5.

4. State the percentage of any negligence which was a legal cause of damage to Van Jones, that you charge to:

Defendant The Toro Company	85%
Plaintiff Van Jones	15%
Total must be	100%

Please answer question 5.

5. What is the total amount (100%) of any damages sustained by each Plaintiff, caused by the incident in question.

Total damages of Van Jones	$1,058,000
Total damages of Maryann Jones	$ 150,000

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of Van Jones. If you have found him negligent in any degree, the court in entering judgment will reduce plaintiff's total amount of damages (100%) by the percentage of negligence which you found is chargeable to Jones.

SO SAY WE ALL THIS —— day of ————, 1989.

_____

Foreman or Forewoman

Supreme Court, U.S.
FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE TORO COMPANY,

Petitioner,

v.

WHIPPLE VAN NESS JONES, JR.,
and MARYANN CAUSSEAUX JONES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Toro Company's statement of the case omits some of the facts and proceedings relevant to this court's consideration of whether to grant a writ of certiorari.

Plaintiff Van Jones suffered severe burns in a fire that occurred while he was refueling his $9,000 Toro riding lawnmower. (R. vol. 5 at 3-4, 36-38, 52; R. vol. 4 at 34-36, 55-56). All experts agreed that this was not "spontaneous combustion" but that there was a specific cause

of the fire. (E.g., R. vol. 6 at 37, 120, 146; R. vol. 7 at 142-43, 174; R. vol. 8 at 109, 196). Expert testimony established three possible causes.

First, Toro placed an air filter (which used a whirling motion that created static electricity) next to the fuel tank, where a static electricity spark could ignite a fire during the refueling process. (R. vol. 6 at 145-46). Second, Toro placed a "traction switch" in the area below the tank (where heavier-than-air gas fumes would reach it) and unnecessarily wired the switch on the "hot side" of the battery, so that there was power to the switch even when the mower was turned off; this created a risk of sparking and resulting fire during the refueling process. (R. vol. 6 at 16-17, 21-22, 56, 65, 146-49). And third, according to Toro's own expert, the hottest parts of the mower continued to get hotter after it was turned off, creating a risk of fire if refueled "ten minutes after, or an hour after" the mower was turned off. (R. vol. 8 at 46).

Toro's warning on the mower said simply: "Stop engine before adding fuel." (R. vol. 5 at 59-60; R. vol. 7 at 27-28). The warning did not advise the user to wait at least an hour (as Toro's own expert said was appropriate), or to wait any period at all, between turning the mower off and refueling it. (*Id.*). On the day at issue, Mr. Jones complied with Toro's warning, refueling the mower some five to 15 minutes after turning it off. (R. vol. 5 at 60, 64; R. vol. 7 at 28). According to Toro's own expert, this is what caused the fire. (R. vol. 8 at 38, 46, 98; see also R. vol. 4 at 38; R. vol. 5 at 60; R. vol. 7 at 28).

In addition, Toro gave no warning of the static electricity risk created by the air filter and no instructions concerning the easy steps by which a user could discharge the static and thus avoid the risk of fire. (R. vol. 5 at 59, 81-82). Mr. and Mrs. Jones presented expert testimony that this caused the fire. (R. vol. 6 at 120, 146, 75).

The Joneses sued Toro in two counts: strict liability and negligence. As submitted to the jury, both counts addressed Toro's design and manufacture of the mower. In addition, the negligence count (but not the strict liability count) addressed the improper warnings. The warning issue was submitted to the jury *only* on the negligence count, not on the strict liability count. (R. vol. 9 at 113).

Toro did not move for a directed verdict on the warning issue. (R. vol. 9 at 12). Toro did not object to submission of the warning issue to the jury. (*Id.*). Toro did not object to the jury instructions on the warning issue. (R. vol. 9 at 13-22).

Without objection, the court instructed the jury that the strict liability and negligence counts should be considered separately. (R. vol. 9 at 114). The court instructed the jury on the differing requirements of Florida law regarding the two legal theories; in Florida, these distinct causes of action require proof of different elements, as the instructions noted. (R. vol. 9 at 114-16). The court instructed the jury, without objection, that its verdict would be for the Joneses if the jury found for the Joneses on *either* of the two separate theories. (R. vol. 9 at 116).

Without objection, the verdict form included an ultimate question to the jury on the strict liability count and an ultimate question on the negligence count. (Petition App. 6a). These questions were intended to determine the winner on each count without any indication of the jury's underlying reasoning. Three additional questions dealt with subsidiary issues: Toro's claim that Mr. Jones was comparatively negligent, the apportionment of negligence if both Toro and Mr. Jones were found negligent, and the amount of damages. (*Id.*).

The jury returned its verdict for the Joneses on the negligence count and for Toro on the strict liability

count. Toro made no claim at that time that the verdict was inconsistent in any respect. (R. vol. 3, tab 115 at 5). Without objection, the jury was discharged. (*Id.*). Judgment was entered on the verdict. (R. vol. 3 at 108).

Thereafter, Toro moved for a new trial, asserting (among other things) that the verdict was inconsistent. The district court denied the motion.

Toro appealed. In its initial brief in the Eleventh Circuit, Toro did not raise alleged inconsistency of the verdict as a basis for reversal. Toro framed the issues as follows:

> Appellant, The Toro Company ("Toro"), raises the following issues on appeal:
>
> 1. Whether the trial judge abused his discretion in denying Toro's motion for a new trial given that the jury verdict was not sustainable under any legal theory or under the facts presented at trial?
> 2. Whether the trial judge abused his discretion in denying Toro's motion for a new trial where the jury instructions were reasonably calculated to confuse or mislead the jury?
> 3. Whether the trial judge's vague and confusing instruction to the jury and his denial of Toro's motion for a new trial violated Toro's due process rights?

Appellant's Brief in Eleventh Circuit, page 1.

In response to Toro's brief, the Joneses cited the overwhelming record evidence of Toro's negligence, including (but not limited to) the evidence that Toro negligently failed to warn Mr. Jones not to refuel the mower within an hour after turning it off. The Joneses noted further that Toro had not even moved for a directed verdict at the close of all the evidence; Toro's claim that the evidence was insufficient thus was not properly before the court. Only then, in its reply brief, did Toro alter its

framing of the issue to assert that the verdict was inconsistent.

The Eleventh Circuit affirmed per curiam in a brief, "Do Not Publish" opinion.[1] Responding to the contention in Toro's reply brief that the verdict was inconsistent, the court said:

> Toro argues that this verdict was inconsistent because there was no evidence in the record to support a finding of negligence absent a design defect. *Because the case also presents a question about certain warnings that ought to have been given by Toro, we doubt that the verdict was inconsistent* . . . .

Opinion at 2 (emphasis added). The court then said it did not need to decide the inconsistency issue because Toro had waived any claim of inconsistency by failing to raise the issue prior to the jury's dicharge.

Toro did not move for rehearing or rehearing en banc.

Toro did move, first in the district court and then in the Eleventh Circuit, for a stay of execution pending this court's review of Toro's petition for a writ of certiorari. In the Eleventh Circuit, Toro filed a copy of its petition, as filed in this court, and Toro argued that this court allegedly is likely to grant the writ. The Joneses noted in response that the verdict was not inconsistent. The Eleventh Circuit, which had reviewed the record and had said in its opinion that it "doubt[ed]" the verdict was inconsistent, summarily denied Toro's motion for a stay of execution, notwithstanding Toro's filing of a supersedeas bond.

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[1] The decision not to publish an opinion reflects the panel's view that the decision "ha[s] no precedential value." See Eleventh Circuit Internal Operating Procedures on Local Rule 36, paragraph 3 (reprinted in Florida Rules of Court—Federal at page 64 (West 1990)).

SUMMARY OF ARGUMENT

Toro is correct that there is a split in the circuits concerning whether a party waives, by failure to raise the issue prior to discharge of the jury, any objection to inconsistencies in a jury's answer to *factual* questions included in a *Rule 49(a)* special verdict. Toro is incorrect, however, in asserting that that issue is well presented in this case. Toro also is incorrect when it asserts that the issue affects constitutional rights or is sufficiently important to warrant this court's review.

First, this verdict was not inconsistent. The question Toro raises thus will have no effect on the ultimate outcome of this case, regardless of how it is resolved.

Second, this was a Rule 49(b) verdict, not a Rule 49 (a) verdict. The law is clear—and even Toro appears to agree—that any alleged inconsistency in a Rule 49(b) verdict is waived if not raised prior to discharge of the jury.

Third, the inconsistency issue was not raised in Toro's initial brief in the Eleventh Circuit and thus was not fully addressed there.

Fourth, the Eleventh Circuit waiver rule is clearly correct.

Fifth, the issue has no constitutional overtones and is not sufficiently important to warrant this court's review.

REASONS FOR DENYING THE WRIT

I. THE VERDICT WAS NOT INCONSISTENT

Toro has admitted that allegedly inconsistent verdicts must be reconciled if at all possible. See Petition for Writ of Certiorari at 7-8. Here reconciliation is not only possible but easy and obvious.

The *uncontested* evidence at trial was that (i) Toro placed on the mower the warning "Stop engine before adding fuel," without any suggestion that any delay was advisable between turning the engine off and refueling, and (ii) Mr. Jones complied with this warning. (R. vol. 5 at 59-60; R. vol. 7 at 27-28). Toro's own expert testified, however, that because the hottest parts of the mower initially get hotter after it is turned off, the mower should not be refueled "ten minutes after, or an hour after" the mower is turned off. (R. vol. 8 at 46). His testimony was that Mr. Jones's failure to wait longer was what caused this fire. (R. vol. 8 at 38, 46, 98; see also R. vol. 4 at 38). The jury was entitled to believe this.[2]

It is clear—and cannot reasonably be contested—that (i) the warning issue was raised in the pleadings and litigated at the trial, (ii) Toro never moved for a directed verdict on the warning issue or otherwise objected to submission of the warning issue to the jury, (iii) the court instructed the jury on the warning issue without objection from Toro, (iv) the warning issue was sub-

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[2] The jury also was entitled to find, alternatively, that a static electricity spark caused the fire, as a different expert testified. The jury could have found that use of this type air filter and its placement next to the fuel tank served an important function and therefore was not a "defect" under the court's uncontested jury instructions on the strict liability count. The jury also could have found, however, that Toro was negligent for failing to warn of the easy procedures necessary to eliminate the risk of a static spark during refueling. The jury thus could have found Toro negligent for failure to provide adequate warnings, even though there was no "defect."

mitted to the jury on the negligence count only, not on the strict liability count, (v) Toro never asserted prior to entry of judgment that there was insufficient evidence of negligent warnings, and (vi) if the jury found the warnings negligent, its verdict was entirely consistent.[3]

Even aside from the warning issue, the verdict was not inconsistent. In Florida, causes of action for strict liability and negligence require proof of distinct elements. As the district court instructed the jury, without objection, these were separate counts requiring application of different standards.[4]

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[3] There was no contention that the temperature of the mower constituted an "unreasonably dangerous" condition that would render Toro strictly liable. The temperature of the mower was an issue only with respect to the warning, which in turn was an issue only on the negligence count. See also footnote 2, supra.

[4] In some specific factual contexts (such as a simple case where a ladder either failed or didn't), proof of a "defect" as defined in Florida law and proof of negligent design or manufacture will stand or fall together. That is not always so, however, and the only case cited by Toro on this subject explicitly says that "defect" and negligence must coexist only "[i]n *some* cases." Consolidated Aluminum Corp. v. Braun, 447 So.2d 391, 392 (Fla. Dist. Ct. App.) (emphasis added), review denied, 455 So.2d 1033 (Fla. 1984). Contrary to Toro's assertion, no Florida case holds that a finding of no defect is in all circumstances inconsistent with a finding of negligent design or manufacture. On the contrary, the Florida Supreme Court has adopted standard jury instructions giving distinct standards for these separate causes of action. Compare Florida Standard Jury Instruction 4.1 (negligence) with Florida Standard Jury Instructions PL 4 and 5 (strict product liability, including detailed prerequisites for a finding of "defect"); see also In re Standard Jury Instructions, 198 So.2d 319 (Fla. 1967) (officially adopting standard instructions). At least some other jurisdictions have agreed that a product may be negligently designed or manufactured but contain no "defect." See, e.g., Hasson v. Ford Motor Co., 19 Cal.3d 530, 138 Cal. Rptr. 705, 564 P.2d 857, 864-66 (1977); Toner v. Lederle Laboratories, 828 F.2d 510, 513-14 (9th Cir. 1987) (applying Idaho law), cert. denied, 485 U.S. 942 (1988). Thus even aside from the warning issue, this verdict was not inconsistent. And even more clearly, these are not issues warranting this court's attention.

In short, this verdict was not inconsistent. The Joneses are private individuals with no stake in the legal issue of waiver, which ultimately will not affect the validity of their judgment. This court should not grant a writ of certiorari to consider an issue the Eleventh Circuit correctly said it "doubt[ed]" would make a difference in the outcome of the case.

II. THIS WAS NOT A RULE 49(a) VERDICT

At least nine circuits apparently agree that a party waives any objection to inconsistency of a Rule 49(b) verdict by failing to raise the issue prior to discharge of the jury, at least in most circumstances.[5] Toro itself seems to accept this rule. See Petition for Writ of Certiorari at 10-11 & n.7. The conflict relied upon by Toro relates only to Rule 49(a) verdicts.

Rule 49(a) addresses the situation where the court submits to the jury "*only* a special verdict in the form of a special written finding upon each *issue of fact.*" Federal Rule of Civil Procedure 49(a) (emphasis added). Rule 49(b) addresses the distinct situation of a general verdict accompanied by additional interrogatories. This case involves the latter.

Here the court's first two questions to the jury asked in effect for a general verdict on each of the two counts.

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[5] See, e.g., Fernandez v. Chardon, 681 F.2d 42, 58 (1st Cir. 1982), aff'd sub nom. Chardon v. Soto, 462 U.S. 650 (1983); Haskell v. Kaman Corp., 743 F.2d 113, 123 (2d Cir. 1984); White v. Celotex Corp., 878 F.2d 144, 146 (4th Cir.), cert. denied, 110 S.Ct. 406 (1989); Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 534-35 (5th Cir. 1974); Tennessee Consolidated Coal Co. v. United Mine Workers, 416 F.2d 1192, 1200-01 (6th Cir. 1969), cert. denied, 397 U.S. 964 (1970); Cundiff v. Washburn, 393 F.2d 505, 507 (7th Cir. 1968); Lockard v. Missouri Pacific R.R. Co., 894 F.2d 299, 304 (8th Cir. 1990), cert. denied, 59 U.S.L.W. 3235 (Oct. 1, 1990); Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416, 1422 (10th Cir.), cert. denied, 479 U.S. 1007 (1986); Golub v. J. W. Gant & Associates, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989).

Each was a single ultimate mixed question of law and fact intended to determine the outcome on that count. If this is not a Rule 49(b) verdict, then the distinction between Rules 49(a) and (b) is indeed one of form over substance.

To be sure, the Eleventh Circuit referred to this as a Rule 49(a) verdict. Toro did not raise inconsistency of the verdict in its initial brief in the Eleventh Circuit; Toro's initial brief cited neither Rule 49(a) nor Rule 49(b) nor any case dealing with waiver of inconsistency. The Joneses, in their single brief in the Eleventh Circuit, thus had no occasion to address which type verdict this was; the Joneses cited neither rule in their brief. In its reply brief, to which the Joneses had no opportunity to respond, Toro claimed inconsistency of the verdict, stated without analysis that this was a Rule 49(a) verdict, and completely mischaracterized the Eleventh Circuit's waiver cases. The Eleventh Circuit, in a "Do Not Publish" opinion designed to reject Toro's mischaracterization of the Eleventh Circuit's waiver cases, and without the benefit of briefing on what type verdict this really was, repeated without analysis Toro's statement that this was a Rule 49(a) verdict. In short, this issue has never been briefed in this case at any level.

Properly analyzed, this case involves Rule 49(b). Toro's reliance on Rule 49(a) cases thus is misplaced.

III. TORO FAILED TO RAISE FULLY IN THE ELEVENTH CIRCUIT THE ISSUE IT SEEKS TO PRESENT HERE

Toro's initial brief in the Eleventh Circuit did not raise as an issue the alleged inconsistency of the verdict. The Joneses, in their single brief in that court, addressed any claim of inconsistency only very briefly, in an (unsuccessful) effort to prevent Toro from raising the issue in its reply brief with no opportunity for the Joneses to respond at all.

This case comes here based on a "Do Not Publish" opinion that responds to Toro's mischaracterization of Eleventh Circuit precedents and does not set forth the court's full analysis of this issue. This is not the record on which this court should address any conflict among the circuits, even if otherwise appropriate for review.

IV. THE ELEVENTH CIRCUIT'S DECISION IS CORRECT

Any alleged inconsistency in a verdict can be clarified or cured very easily if the issue is promptly raised, before discharge of the jury. By resubmitting the issue to the jury with further instructions as needed, the necessity for a retrial is avoided. Rule 49(b) expressly allows such resubmission, and courts thus have held that failure to raise inconsistency of a Rule 49(b) verdict prior to the jury's discharge—when the inconsistency can be obviated—waives any objection. See footnote 5, supra.

There is no reason for a different result under Rule 49(a). Nothing in that rule prohibits a court from resubmitting an issue to the jury to resolve any inconsistency. *See, e.g., Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1178 (5th Cir. 1987). Under Rule 49(a), just as under Rule 49(b), any inconsistency can be cured if promptly raised.[6]

The appropriateness of the waiver rule is well illustrated here. This trial was perfect, or as nearly perfect

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[6] The only colorable argument for a different waiver rule under Rules 49(a) and (b) might be that (i) under Rule 49(b), there is a general verdict disclosing which party the jury thought should win each count, notwithstanding any inconsistency in the jury's answers to subsidiary factual questions, whereas (ii) under Rule 49(a), there are "only" answers to specific "factual" questions and no general verdict, so that an inconsistency might prevent the court from knowing which side the jury really supported on a given count. If this is the rationale, then the verdict here—which clearly reflects the jury's determination of which side should win each count—must be characterized as a Rule 49(b) verdict, unquestionably subject to the waiver rule.

as any ever is. There were no objections to the jury selection process. There were no disputed evidentiary rulings. There were no objections to the jury instructions. There were no objections to the form of verdict. There were no objections to the court's conduct of the trial in any respect. If Toro really thought the verdict was inconsistent, it could have raised the issue, and further interrogatories to the same jury would have resolved the dispute. Instead, Toro stood silent, the jury was discharged, and Toro now seeks to compel an unnecessary retrial by a district court that conducted a perfect trial.

Neither the court system nor most litigants have the resources to retry cases for no good reason. There is no good reason to allow a party to sandbag a district court and force a retrial that easily could be avoided. *See, e.g., Fernandez v. Chardon*, 681 F.2d 42, 58 (1st Cir. 1982) (waiver rule's purpose is to "promote the efficiency of trials by allowing the original deliberating body to reconcile inconsistencies without the need for a new presentation of evidence to a different body"), *aff'd sub nom. Chardon v. Soto*, 462 U.S. 650 (1983).

V. THIS ISSUE DOES NOT WARRANT THIS COURT'S ATTENTION

This is a diversity case that produced a brief "Do Not Publish" opinion in the court below. The case will have no precedential value. This court does not sit to review decisions that will affect only the private litigants to the single case on which review is sought.

Whether this was a Rule 49(a) or 49(b) verdict—an issue never briefed in the court below—is not an issue that warrants this court's attention. Whether this verdict was inconsistent under Florida law relating either to warnings or to negligent design and manufacture is not a question that warrants this court's attention. This court ought not reach out to address a conflict among the circuits relating solely to Rule 49(a) in a vacuum, without

attention to what type verdict this really was and whether it was inconsistent at all.

Moreover, the issue of whether inconsistency in a Rule 49(a) verdict is waived if not timely raised is not a question warranting this court's attention, even in a case (unlike this one) where the issue is well presented.

First, the waiver rule affects no constitutional rights. It apparently is undisputed that objections to inconsistent Rule 49(b) verdicts are waived if not promptly made; surely there is no *constitutional* difference between Rules 49(a) and (b). This is simply not a constitutional issue in any form or fashion.[7]

Second, there is no need for national uniformity on this, any more than there is a need for national uniformity regarding the many other trial procedures now treated differently in different circuits or districts, such as the sequence in which the parties exercise peremptory challenges or the number of jurors in civil cases. If courts in the Ninth Circuit choose to retry cases unnecessarily, that is no reason why courts in the Eleventh must do so. This court ought not grant a writ of certiorari.

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[7] In asserting the contrary, Toro cites cases trumpeting the sanctity of jury verdicts. See Petition for Writ of Certiorari at 7-8. It is indeed ironic that a party that clearly lost before the jury now seeks to take away its adversary's jury verdict by citing decisions holding that such verdicts must be upheld whenever possible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 8, 1990

(3)

No. 90-589

FILED
NOV 21 1990
JOSEPH F. SPANIOL, JR.
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MARYANN CAUSSEAUX JONES, HIS WIFE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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TABLE OF AUTHORITIES

CASES Page

American Motors Corp. v. Ellis, 403 So.2d 459 (Fla. Dist. Ct. App. 1981), *reh'g denied*, 415 So.2d 1359 (Fla. 1982) 5
Aquachem Co. v. Olin Corp., 699 F.2d 516 (11th Cir. 1983) 2
Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884 (2d Cir. 1988) 2
Bonin v. Tour West, Inc., 896 F.2d 1260 (10th Cir. 1990) 5
Cassisi v. Maytag Co., 396 So.2d 1140 (Fla. App. 1981) 6
Consolidated Aluminum Corp. v. Braun, 447 So.2d 391 (Fla. Dist. Ct. App. 1984) 6
Dreiling v. General Electric Co., 511 F.2d 768 (5th Cir. 1975) 3
Furr v. AT&T Technologies, Inc., 824 F.2d 1537 (10th Cir. 1987) 2
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Itel Capital Corp. v. Cups Coal Co., 707 F.2d 1253 (11th Cir. 1983) 7
Litman v. Massachusetts Mut. Life Ins. Co., 739 F.2d 1549 (11th Cir. 1984) 3
Mercer v. Long Mfg. N.C., Inc., 665 F.2d 61 (5th Cir. 1982) 2
Tights, Inc. v. Acme-McCrary Corp., 531 F.2d 1047 (4th Cir. 1976), *cert. denied*, 429 U.S. 980 (1976) 2
Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84 (5th Cir. 1966) 4

OTHER AUTHORITIES

Fed. R. Civ. P. 49(a), 49(b) ..... *passim*
J. Henderson & A. Twerski, *Products Liability* 387-88 (1987) 5
5A J. Moore, *Moore's Federal Practice* ¶ 49.03[2] (1990) 3
9 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2506, 2508 (2d ed. 1971) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-589

THE TORO COMPANY,

Petitioner,

v.

WHIPPLE VAN NESS JONES, JR., and
MARYANN CAUSSEAUX JONES, HIS WIFE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

Respondents present no persuasive reason for denying Toro's petition. To the contrary, they explicitly agree (Opp. 6) that there is a split of authority among the circuits concerning the issue presented by this case. Yet, Respondents argue that this case does not warrant review. As discussed below, Respondents' arguments are without merit.

1. Although Respondents concede that there is a square conflict among the circuits concerning whether a party waives the inconsistency of a verdict rendered pursuant to Fed. R. Civ. P. 49(a) by its failure to object thereto before the jury is discharged, they suggest that the conflict need not be resolved here because the verdict in this

case was rendered pursuant to Rule 49(b), rather than Rule 49(a). For the first time, Respondents challenge (Opp. 9-10) the propriety of the verdict under Rule 49(a), stating that Rule 49(a) permits the jury to answer only purely factual questions. Respondents assert that the verdict therefore must be deemed to have been rendered under Rule 49(b). This contention is wrong as a matter of both law and fact.

Established case law refutes Respondents' argument. Special interrogatories combining questions of law and fact are clearly proper under Rule 49(a). *See, e.g., Tights, Inc. v. Acme-McCrary Corp.*, 531 F.2d 1047, 1061 (4th Cir.), *cert. denied*, 429 U.S. 980 (1976) ("[i]f an issue presents a mixed question of fact and law, it may be submitted if the jury is instructed as to the legal standard to be applied."). Many courts have held "single ultimate mixed question[s] of law and fact" (Opp. 10) to be appropriate special interrogatories under Rule 49(a). *See Aquachem Co. v. Olin Corp.*, 699 F.2d 516, 519 (11th Cir. 1983) (jury found defendant to have posed a threat of acquiring monopoly power under Section 2 of the Sherman Act); *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 887 (2d Cir. 1988) (jury given special interrogatory under Rule 49(a) as to whether defendants had formed, joined or participated in a conspiracy, combination or agreement that was intended to and did constitute an unreasonable restraint of trade); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537, 1544 n.5 (10th Cir. 1987) (jury asked to determine whether any violation of the Age Discrimination in Employment Act by the defendant was willful); *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 62, 64 n.8 (5th Cir. 1982) (jury asked separate special interrogatories under Rule 49(a), "one for each of the three theories of liability"); *Griffin v. Matherne*, 471 F.2d 911, 913 n.2 (5th Cir. 1973) (jury given special interrogatories under Rule 49(a) specifically addressing the ultimate issue of negligence). Indeed, special interrogatories

virtually identical to those at issue here were considered appropriate *under Rule 49(a)* in *Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975).[1] Moreover, Respondents' assertion (Opp. 9) that the verdict in this case was rendered pursuant to Rule 49(b) ignores the explicit terms of that rule, which require the jury to answer interrogatories *and to render a general verdict.* Fed. R. Civ. P. 49(b); quoted at Pet. 2-3.

In addition, Respondents' argument is irrelevant, because the Eleventh Circuit in fact held *under Rule 49(a)* that the doctrine of waiver applied. *See* Pet. App. 2a ("[t]he jury issued the special verdict in the form of answers to questions presented by the court pursuant to Federal Rule of Civil Procedure 49(a)").[2] Respondents'

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[1] Special interrogatories may combine several elements of a claim into a single question, as long as the question is fair and does not combine two issues disjunctively. *Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1560 (11th Cir. 1984). *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2506, 2508 (2d ed. 1971); 5A J. Moore, *Moore's Federal Practice* ¶ 49.03[2] (1990). These matters are within the sound discretion of the district court. *Dreiling v. General Elec. Co.*, 511 F.2d 768, 774 (5th Cir. 1975).

[2] Respondents' suggestion that the Eleventh Circuit required extensive briefing by the parties in order to appreciate the nature of the verdict at issue underestimates the court of appeals. Moreover, if Respondents actually believed that the court of appeals required further assistance with respect to this issue, they could have attempted to provide it at the time of oral argument. In fact, Respondents expressly stated that there was no need for oral argument (*see* Respondents' C.A. Br. at ii). Finally, Respondents' suggestion (Opp. 10-11) that Toro failed to preserve the waiver issue for review by this Court is utterly without merit. Petitioner raised the issue of inconsistency in its opening brief on appeal to the Eleventh Circuit. *See* Petitioner's C.A. Br. at 12-13. Respondents' contention is further refuted by their own admissions that they addressed the issue (albeit, allegedly "very briefly" (Opp. 10), *see* Respondent's C.A. Br. at 17-19), and that Toro treated the issue fully in its reply (Opp. 10; *see* Petitioner's C.A. Reply Br. at 6-9). Nothing more is required to preserve the issue for this Court's review.

argument amounts to nothing more than an attempt to avoid the indisputable conflict among the circuits concerning the proper practice under Rule 49(a) and should be rejected.[3]

2. Respondents also contend (Opp. 7-9) that this case does not warrant further review because the verdict can be reconciled on the ground that, although the jury found no product defect, it could have found negligence for failure to warn of known dangers connected with the use of the lawnmower. The question before the Court, however, is not whether the verdict in fact can be reconciled, but the more significant question of Petitioner's right to judicial consideration of whether the verdict can be reconciled. Petitioner's argument does not depend on resolution of any factual dispute, but raises the purely legal issue regarding waiver.

In any event, the verdict cannot be reconciled on the ground that the jury based its finding of negligence on an alleged failure to warn. Contrary to Respondents' implication (Opp. 7), the Operator's Manual that accompanied the lawnmower in question cautioned users to fill the fuel tank with gasoline before starting the engine and not to "fill fuel tank while engine is running, *hot* or when machine is in an enclosed area." (Emphasis added). *See* attached Supp. App. 2a; Petitioner's C.A. Record Excerpts; P. Ex. 66, p. 4. Assuming (as Respondents' "warnings" argument does) that the fire was the result

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[3] Respondents argue further (Opp. 11) that there is no basis for the distinction made in most of the circuits between Rule 49(a) and 49(b). The decisions of the majority of courts that have addressed this issue clearly contradict Respondents' contention. *See* Pet. 10-11; *Weymouth v. Colorado Interstate Gas Co.*, 367 F.2d 84, 93 n.31 (5th Cir. 1966) (noting "significant difference" between Rule 49(a) and 49(b)). Moreover, even if Respondents are correct that there should be no distinction between Rule 49(a) and 49(b), that fact would increase rather than diminish the need for this Court to address the issue, since most courts have adopted the allegedly false distinction.

of Mr. Jones' refueling the motor while the engine was still hot, he obviously did not follow the instructions in the Operator's Manual *not* to refuel while the engine was hot (or running). There thus was no basis on which the jury could have assumed that Mr. Jones would have followed a more specific warning set forth on the mower not to refuel for an hour after the engine had been running, and the inconsistency in the verdict therefore cannot be reconciled on that ground. *See* J. Henderson & A. Twerski, *Products Liability* 387-88 (1987); *American Motors Corp. v. Ellis*, 403 So.2d 459 (Fla. Dist. Ct. App. 1981), *reh'g denied*, 415 So.2d 1359 (Fla. 1982) (no proof of causal relationship between breach of a duty to warn and injury).[4]

Respondents also suggest in passing (Opp. 8 & n.4) that the jury may have believed that different standards obtain for determining the existence of a product defect under a strict liability theory as opposed to a negligence theory. As noted in Toro's petition (at 9 n.5), however, it cannot reasonably be presumed that such an abstruse distinction, even assuming it existed in the law, was derived by a jury of laypersons from the verdict form before them or the trial court's instructions. *Cf. Bonin v. Tour West, Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990) (reversing attempted reconciliation where the language of questions submitted to the jury was "too similar" to hold that the jury distinguished between negligence that caused the accident and negligence that caused the injuries).

Moreover, the Florida courts require as an element of negligence arising from the manufacture and/or distribution of a product proof that a defect was present in

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[4] Respondents also contend (Opp. 7 n.2) that the alleged risk posed by static electricity, which one of their experts testified was the cause of the fire, could have been eliminated by appropriate warnings. Again, however, there was no suggestion in the evidence that Mr. Jones would have abided by any such additional warnings had they been provided.

the product. *Consolidated Aluminum Corp. v. Braun*, 447 So. 2d 391, 392 (Fla. Dist. Ct. App. 1984); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1143 (Fla. App. 1981). To support a finding of negligence under Florida law, the jury would have had to find three elements: "(1) that a defect was present in the product; (2) that [the defect] caused the injuries complained of; and (3) that [the defect] existed at the time the retailer or supplier parted possession with the product." *Cassisi v. Maytag Co.*, 396 So.2d at 1143. The jury found in its answer to question 1 (*see* Pet. App. 6a) that Petitioner did not "place the lawnmower on the market with a defect." As a matter of law and common sense, therefore, the verdicts cannot be reconciled.

Significantly, the charge submitted to the jury here (*see* attached Supp. App. 4a; Respondents' C.A. Corrected Record Excerpts at 29-30; C.A. R-3-99-11-12) encompassed every legal definition of "defect." *Compare*, *Hasson v. Ford Motor Co.*, 19 Cal. 3d 530, 138 Cal. Rptr. 705, 564 P.2d 857, 864-66 (1977) (verdict reconcilable where jury received narrow instruction on defect coupled with broad instruction on negligence; court ruled jury could have found a defect in the product which, although falling outside narrow instruction on defect, would support a finding of negligence). The charge in *Hasson* on which Respondents rely (Opp. 8 & n.4) focused only on a defect existing at the time of manufacture. In this case, by contrast, the charge encompassed all three theories of defect: manufacture, design, and expectations of the consumer. *See* Supp. App. 4a. There was thus no possibility that in finding "no defect" under strict liability, the jury could have been relying on an alternative definition of "defect."

3. Finally, Respondents argue (Opp. 12) that this case is unworthy of the Court's review because the Eleventh Circuit's opinion is unpublished. That opinion, however, mechanically applies the Eleventh Circuit's published decisions in *Golub v. J.W. Gant & Assocs.*, 863 F.2d 1516,

1521 n.4 (11th Cir. 1989), and *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1261 (11th Cir. 1983) (Pet. App. 2a).[5] If such a procedure may be employed by the court of appeals so as to insulate from review its harsh waiver rule, the error and inequity of the rule will remain uncorrected.[6]

For the foregoing reasons and those stated in Toro's petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 1990

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[5] The Eleventh Circuit placed this case on its summary calendar and declined even to hear argument on Petitioner's objection to the inconsistency of the verdict.

[6] Respondents assert (Opp. 13) that this case presents no constitutional issue. As noted above and in Toro's petition (Pet. 6-8), several courts have discussed the constitutional dimensions of this issue under Rule 49(a) and its importance in preserving the right to a jury trial.

APPENDIX

APPENDIX

OPERATOR'S MANUAL

BEFORE OPERATING

Above 32°F (0°C)—Use SAE 10W-30 engine oil. SAE 10W-40 engine oil or type A automatic transmission fluid may be used as a substitute.

Below 32°F (0°C)—Use type A automatic transmission fluid. SAE 5W-20 engine oil may be used as a substitute.

IMPORTANT: DO NOT intermix automatic transmission fluid with engine oil. DO NOT USE DEXTRON II ATF.

1. Position machine on a level surface, raise the cutting unit and stop the engine.

2. Remove dipstick cap (Fig. 10) from filler neck and wipe it with a clean rag. Screw dipstick cap finger-tight onto filler neck; then remove it and check level of fluid. If level is not within ½ inch (13 mm) from the groove in the dipstick (Fig. 10), add SAE 10W-30 engine oil, or, if used, automatic transmission fluid to raise level to groove mark. Do not overfill.

[Figure 10 Omitted in Printing]

IMPORTANT: When adding transmission fluid to the hydraulic system, use a funnel with a fine wire screen—200 mesh or finer—and make sure funnel and transmission fluid are immaculately clean. This procedure prevents accidental contamination of the hydraulic system.

3. Thread dipstick filler cap finger-tight onto filler neck. It is not necessary to tighten cap with a wrench.

FILL FUEL TANK WITH GASOLINE

THE TORO COMPANY STRONGLY RECOMMENDS THE USE OF CLEAN, FRESH UNLEADED REGULAR GASOLINE IN TORO GASOLINE POWERED

PRODUCTS. UNLEADED GASOLINE BURNS CLEANER, EXTENDS ENGINE LIFE, AND PROMOTES GOOD STARTING BY REDUCING THE BUILD-UP OF COMBUSTION CHAMBER DEPOSITS. LEADED GASOLINE CAN BE USED IF UNLEADED IS NOT AVAILABLE.

NOTE: NEVER USE METHANOL, GASOLINE CONTAINING METHANOL, GASOHOL CONTAINING MORE THAN 10% ETHANOL, GASOLINE ADDITIVES, PREMIUM GASOLINE, OR WHITE GAS BECAUSE ENGINE FUEL SYSTEM DAMAGE COULD RESULT.

[EMBLEM] **DANGER**

Because gasoline is flammable, caution must be used when storing or handling it. Do not fill fuel tank while engine is running, hot or when machine is in an enclosed area. Vapors may build up and be ignited by a spark or flame source many feet away. DO NOT SMOKE while filing [sic] the fuel tank to prevent the possibility of an explosion. Always fill fuel tank outside and wipe up any spilled gasoline before starting engine. Use a funnel or spout to prevent spilling gasoline before starting engine and fill tank to about 1 inch (25 mm) below the filler neck. Store gasoline in a clean safety-approved container and keep the cap in place on the container. Keep gasoline in a cool, well-ventilated place; never in an enclosed area such as a hot storage shed. To assure volatility, do not buy more than a 30 day supply of gasoline. Gasoline is a fuel for internal combustion engines; therefore, do not use it for any other purpose. Since many children like the smell of gas, keep it out of their reach because the fumes are explosive and dangerous to inhale.

1. Tip seat forward and prop it so it cannot fall accidentally. Using a clean rag, clean area around fuel tank cap (Fig. 11).

2. Remove cap from the fuel tank and fill the 6 gallon (22.7 L) tank to within 1 inch (25 mm) from the top with gasoline. Install fuel tank cap tightly.

3. Wipe up gasoline that may have spilled to prevent a fire hazard. Remove support from under seat and allow seat to pivot back to its normal position.

[Figure 11 Omitted in Printing]

WRITTEN JURY INSTRUCTIONS

The issues for your determination on the strict liability claim of Van and Maryann Jones against The Toro Company are whether the lawnmower manufactured by The Toro Company was defective when it left the possession of The Toro Company and, if so, whether such defect was a legal cause of injury or damage sustained by Van Jones.

A product is defective:

1. If it is manufactured in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition; or

2. If by reason of its design the product is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if a) the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer or b) the risk of danger in the design outweighs the benefits.

In determining whether a product is defective, you may consider whether the product was fit for the purpose for which it was intended and whether the product in question conformed to the generally recognized and prevailing standards at the time of its manufacture and sale.